AN ARGUMENT OF LAW

CONCERNING

The BILL of ATTAINDER OF High-Treason OF THOMAS Earle of *Strafford*:

At a Conference in a Committe of both Houses of Parliament.

By Mr. St. JOHN his *Majesties* Solicitor GENERALL.

Published by order of the Commons House.

LONDON,
Printed *Anno Domini* 1641.

AN

ARGUMENT

OF

LAW

CONCERNING

THE DISCLAIMER OF A

OF

High-Treason

OF

CO

[illegible]

As it was performed in a Conference
of both Houses of Parliament.

By Mr. SELDEN his Majesties Solicitor
GENERALL.

Published by Order of the Commons House.

LONDON,
Printed [illegible] Dawson. 1641.

MR. ST. JOHN'S Argument.

My Lords,

THE Knights, Citizens, and Burgesses of the Commons House of Parliament, have passed a Bill for the attainting of *Thomas* Earle of *Strafford* of High-Treason. The Bill hath beene transmitted from them to your Lordships. It concernes not him alone, but your Lordships and the Commons too, though in different Respects.

It is to make him as miſerable a man, as man or Law can make him.

Not loſſe of life alone, but with that, of honour, name, poſterity, and eſtate, Of all thats deare to all.

To uſe his own expreſſion, an eradication of him both root and branch, as an *Achan*, a troubler of the State, as an execrable, as an accurſed thing.

This Bill as it concernes his Lordſhip the higheſt that can be in the penall part, ſo doth it on the other ſide as highly concerne your Lordſhips and the Commons in that which ought to be the tendreſt, the Judicatory within, that that judge not them who judge him: And in that which is moſt ſacred amongſt men, the publike Juſtice of the Kingdome.

The Kingdome is to bee accounted unto for the loſſe of the meaneſt member, much more for one ſo neare the head.

The Commons are concerned in their Account for what is done, your Lordſhips in that which is to be done.

The Buſineſſe therefore of the preſent Conference, is to acquaint your Lordſhips with thoſe things that ſatisfied the Commons in paſſing of this Bill, ſuch of them as have come within my capacity, and that I can remember, I am Commanded from the Commons at this time to preſent unto your Lordſhips.

My

My Lords, in judgements of greateſt moment, there are but two wayes for ſatisfying thoſe that are to give them, Either the *Lex lata*, the Law already eſtabliſhed, Or elce the uſe of the ſame power for making new Lawes, whereby the old at firſt received life.

In the firſt conſideration, of the ſetled Lawes; In the degrees of puniſhment the poſitive Law received by generall conſent, and for the common good, is ſufficient to ſatisfie the Conſcience of the Judge in giving judgement according to them.

In ſeverall Countreys there is not the ſame meaſure of puniſhment for one and the ſame offence. Wilfull murder in *Ireland* is Treaſon, and ſo is the wilfull burning of a houſe or ſtack of Corne. In the Iſle of *Man*, it's fellony to ſteale a Hen, but not to ſteale a Horſe; and yet the Judge in *Ireland* hath as juſt a ground to give Judgement of high Treaſon in thoſe Caſes there, as here to give Judgement onely of Fellony; and in the Iſle of *Man* of Felony for the Hen, as heere of petty Larceny.

My Lords, in the other conſideration of uſing the Supreame power, the ſame Law gives power to the Parliament to make new Lawes, that enables the inferiour Court to judge according to the old. The rule that guides the conſcience of the Inferior Court is from without, the preſcripts of the Parlia-

ment and of the Common Law; in the other the rule is from within; That *salus populi* bee concerned; That there be no wilfull oppression of any the fellow members; That no more blood be taken than what is necessary for the Cure: The Lawes and Customes of the Realme as well enable the exercise of this, as of the ordinary and Judiciall power.

My Lords, what hath beene said is because that this proceeding of the Commons by way of Bill implies the use of the meere *Legislative* power, in respect new Lawes are for the most part past by Bill.

This, my Lords, though just and Legall, and therefore not wholly excluded, yet it was not the only ground that put the Commons upon the Bill; they did not intend to make a new Treason, and to condemne my Lord of *Stafford* for it, they had in it other Considerations likewise, which were to this effect:

1. First, the Commons knew that in all former ages, if doubts of Law arose upon cases of great and generall Concernement; the Parliament was usually consulted withall for resolution, which is the reason that many Acts of Parliament are onely declarative of the Old Law, not introductive of a new, as the great Charter of our Liber-

ties

ties; the Statute of the five and twentieth yeere of *Edward* the third, of Treasons; the Statute of the Prerogative; and of late the Petition of Right. If the Law were doubtfull in this Case, they conceived the Parliament (where the old may bee altered, and new Lawes made) the fittest Judge to cleare this doubt.

Secondly, my Lords, they proceeded this way to out those scruples and delaies which through dis-use of proceedings of this nature might have risen in the manner and way of proceeding, since the Statute of the first of *Henry* the fourth, the seventeenth Chapter, and more fully in the Roll, number 144. The proceedings in Parliament have usually beene upon an Inditement first found, though in Cases of treason particularly mentioned in the Statute of the five and twentieth yeere of *Edward* the third, which had not been done in this Case: Doubts likewise might rise for Treasons, not particularly mentioned in the Statute of 25. *Edw.* 3. whether the declaratory power of Parliament bee taken away, and if not taken away, in what manner they were to bee made, and by whom. They finde not any Attainders of Treason in Parliament for neere this 200 yeeres, but by this way of Bill. And again, they knew that whatsoever could bee done any other way, it might bee done by this. 2.

Thirdly,

Thirdly, in respect of the proofes and depositions that have beene made against him; for first, although they knew not but that the whole Evidence which hath beene given at the Barre, in every part of it is sufficiently comprehended within the Charge, yet if therein they should be mistaken, if it should prove otherwise, use may justly bee made of such Evidence in this way of Bill, wherein so as Evidence be given in, it's no way requisite that there should have been any Articles or Charge at all. And so in the Case of double Testimony upon the Statute of the first of *Edward* the sixth, whether one direct witnesse with others to Circumstances, had been single or double testimony; and although single Testimony might bee sufficient to satisfie private Consciences, yet how farre it would have beene satisfactory in a judiciall way where formes of Law are more to bee stood upon, was not so cleare; whereas in this way of Bill, private satisfaction to each mans Conscience is sufficient, although no Evidence had beene given in at all.

My Lords, the proceeding by way of Bill, it was not to decline your Lordships Justice in the judiciall way; In these Exegencies of the State and Kingdome, it was to husband time by silencing those doubts, they conceived it the speediest and the surest way.

My

My Lords, These are in effect, the things the Commons took into their Consideration, in respect of the manner, and way of proceeding against the Earle. In the next place I am to declare unto your Lordships, the things they took into their consideration, in respect of the matter and merits of the Cause, They are comprehended within these six heads.

1. That there is a treason within the Statute of 25. *E.* 3. by levying of warre upon the matter of the fifteenth Article.

2. If not by actuall levying of warre, yet by advising and declaring his intention of warre, and that by *Sevils* warrant, and the advice of bringing over the Irish Army, upon the matter in the 23 Article, The intending of a Warre if not within the Clause of Levying Warre in the Statute of 25. *E.* 3. yet within the first treason of compassing the death of the King.

3. If neither of these two single Acts bee within the Statute of 25. *E.* 3. yet upon putting all together, which hath been proved against him, That ther's a treason within the first clause of compassing the death of the King.

Et si non prosunt singula, juncta juvant.

4. That hee hath sessed and laid souldiers upon the subjects of *Ireland* against their will, and at their Charge, within the *Irish* statute, of the eighteenth yeere of

Henry the sixt. That both person and thing are within the statute, That the statute remaines in force to this day, That the Parliament here hath Cognizance of it, And that even in the ordinary way of Judicature, that if there be a Treason, and a Traitor, that the want of jurisdiction in the Judicall way, may justly be supplied by Bill.

5. That his endeavouring to subvert the fundamentall Lawes and Governement of the Realmes of *England* and *Ireland*, and instead thereof, to introduce a tyrannicall Governement against law, is treason by the Common law. That treasons at the Common law are not taken away by the statutes of 25. *E.*3. 1. *H.*4. *c.*10. 1°. *Mar. c.* 1. nor any of them.

6. That as this Case stands, It's just and necessiary to resort to the Supreame power in Parliament, in case all the rest should faile.

Of these six, five of them are treasons within the Compasse of the lawes already established, Three within the statute of 25. *E.* 3. One within the *Irish* statute, The other by the Common law of *England*.

If but any one of these six Considerations hold, The Commons conceive that upon the whole matter they had good cause to passe the Bill.

My

My Lords, for the first of levying Warre, I shall make bold to read the Case to your Lordships before I speake to it, it's thus. I. *The Case.*

The Earle did by warrant under his hand and Seal give authority to *Robert Savill*, a Serjeant at Arms, and his Deputies, to sesse such number of Souldiers, horse and foote of the Army in *Ireland* together with an officer, as the Serjeant should thinke fit, upon his Majesties Subjects of *Ireland* against their will: This warrant was granted by the Earle to the end to compell the Subjects of *Ireland* to submit to the unlawfull Summons and orders made by the Earle upon paper Petitions exhibited unto him in case of private Interest betweene party and party; This warrant was executed by *Savill* and his Deputies by sessing of Souldiers both horse and foote, upon divers of the Subjects of *Ireland* against their will in warre-like manner, and at divers times the Souldiers continued upon the parties upon whom they were sessed, and wasted their goods, untill such time as they had submitted themselves unto those Summons and orders.

My Lords, This is a levying of warre within the statute of 25°. *E.* 3. The words of the statute are, *If any man doe levy warre against our Lord the King in his Realm*, this is declared to be Treason.

I shall endeavour in this to make it appeare to your Lordships.

1. What shall bee a levying of Warre, in respect of the motive or cause of it.

2. What shall be said a levying of warre in respect of the Action or thing done.

3. And in the third place, I shall apply them to the present Case.

It will bee granted in this of levying of warre, That forces may bee raised, and likewise used in a warre-like manner, and yet no levying of warre within the Statute, that is, when the forces are raised and imployed upon private ends either of revenge or interest.

Before this Statute in *E.* 1. time. The Title of a Castle was in difference between the Earles of *Hereford* and *Gloster*, for the maintaining of the possession on the one side, and gayning of it on the other, Forces were raised on either side of many hundred men, they marched with Banners displayed one against the other. In the Parliament in the 20. yeere of *Edw.* 1. this adjudged onely trespasse, and either of the *Earls* fined a 1000 markes apeece.

After the Statute in Hillary Terme, the fiftieth yeere of *Edward* the third, in the *Kings Bench*, *Rot.* 3. *Nicholas Huntercombe* in a warre-like manner, with 40. men armed, amongst other weapons, with Gunnes, (so antient as appeares by that Record they were,) did much spoyle in the Manor of the *Abbee of Dorchester*, in the

County

County of Oxford: This no treason: So it hath beene held by the Judges, that if one or more Townships upon pretence of saving their Commons, doe in a forcible and warre-like manner, throw in Inclosures; This is onely a Riot, no treason.

The words of the Statute of 25. *E.* 3. cleare this Point, that if any man ride armed openly or secretly with men at Armes against any other to kill and robbe, or to detaine him untill hee hath made fine and ransome for his deliverance; this is declared not to bee Treason, but Fellony or Trespasse, as the case shall require; all the printed Statutes which have it covertly or secretly are mis-printed; for the words in the Parliament Roll, as appeares *n.* 17. are *Discovertment ou secreetment* openly or secretly.

So that my Lords, in this of levying warre, the Act is not so much to bee considered, but as in all other Treasons and Fellonies, *quo animo*, with what Intent and purpose.

My Lords, If the end bee considerable in levying warre; it may bee said, that it cannot bee a Treason warre, unlesse against the King: For the words of the statute are, *If any man levy warre against the King.* *Obj.*

That these words extend further than to the *Answ.*

the Person of the King appeares by the wordes of the Statute, which in the beginning declares it to be Treason to compasse and imagine the Kings death, and after other Treesons, this is to be declared to be Treason, to levy warre against the King. If the levying of warre extend no further than to the person of the King; these words of the Statute are to no purpose, for then the first Treason of compassing the Kings death had fully included it before, because that he which levies warre against the person of the King, doth necessarily compasse his death.

Its a warre against the King when intended for alteration of the Lawes or Government in any part of them, or to destroy any of the great Officers of the Kingdome. This is a levying of Warre against the King.

1. Because the King doth protect and maintaine the Lawes in every part of them, and the great Officers to whose care hee hath in his owne steade delegated the Execution of them.

2. Because they are the Kings Lawes. Hee is the Fountaine from whence, in their severall Channels, they are derived to the Subject; all our inditements run thus, Trespasses layd to be done, *Contra pacem Domini Regis*, the Kings peace for exorbitant offences, though not intended against the Kings

Person,

Person, against the King his Crowne and Dignity.

My Lords, this construction is made good by divers Authorities of great weight, ever since the statute of 25. *E.* 3. down wards.

In *R.* the 2ds. time, Sir *Thomas Talbot* conspired the death of the Dukes of *Glocester* and *Lancaster*, and some other of the Peeres; for the effecting of it, hee had caused divers people in the County of *Chester* to be armed in warre-like manner, in Assemblies. In the Parliament held the seventeenth yeere of *Richard* the second, number the 20, Sir *Thomas Talbot* accused of high treason for this; Its there declared, that insomuch as one of them was Lord high Steward of *England*, and the other high Constable of *England*, that this was done in destruction of the estates of the Realme, and of the Lawes of the Kingdome; and therefore adjudged treason; and the judgement sent downe into the Kings Bench, as appeares *Easter-Terme* in the seventh yeere of *Richard* the second, in the Kings Bench, *Rott.* 16. These two Lords had appeared in the eleventh yeere of *Richard* the second in maintenance of the Act of Parliament made the yeare before, one of them was of the Commissioners appointed by Parliament, and one of the Appellours of those that would have overthrowne it: The Duke of *Lancaster* likewise was one of

of the Lords that was to have beene indicted of treason for endeavouring the maintenance of it, and therefore conspiring of their deaths is said to be in destruction of the Lawes; this there declared to bee a treason that concerned the Person of the King and the Commonwealth.

In that great insurrection of the Villains and meaner people in *Richard* the seconds time, they took an oath, *Quod Regi, & Communibus fidelitatem servarent*, to be true to the King and Commons, that they would take nothing but what they paid for; punished all theft with death, heere's no intendment against the person of the King; The intent was to abolish the law of villainage and servitude, to burn all the Records, to kill the Judges, this in the Parliament of the fifth yeere of *Richard* the second, number the one and thirtieth and two and thirtieth, the first part, is declared to bee treason against the King and against the Law.

In the eleventh yeere of *Richard* the second, in Parliament the raising of forces against the Commissioners appointed by act of Parliament the yeer before adjudged treason by all the Judges.

The Statute of 1. *Mar. cap.* 12. enacts, that if twelve or more shall endeavour by force to alter any of the Lawes or Statutes of the Kingdome, hee shall from such a time

time there limited bee adjudged onely as a fellon; This act was to continue but to the next Parliament, it is expired; it shewes by the words onely that the offence was higher before the making of it.

My Lords, In Queene *Elizabeths* time, *Grant* and diverse Prentices of *London* to the number of 200. rose and assembled at Tower-hill, carried a Cloake upon a Pole insteede of a banner, their intent was to deliver divers Prentices out of prison that had beene committed upon a sentence in Star-Chamber for ryots, To kill the Lord Major of *London*, and for setting prices on victuals. In *Trinity Tearme* 37. *Eliz.* divers of the Iudges consulted withall, and resolved that this was a levying of warre against the Queene, being intended against the government and officers of the Queen, and thereupon *Grant* and others executed as Traitors.

Afterwards in that Queenes time, divers of the County of *Oxford* consulted together to goe from house to house in that County, and thence to *London* and other parts to excite them to take Armes for the throwing in of all inclosures throughout *England*, nothing was done, nor no Assembly: The Statute of 13. *Eliz. cap.* 1. during the Queenes life made it Treason to intend or advise to levy war against the Queen.

In *Easter Tearme*, 39. *Eliz.* All the Judges of *England* met about the case, it was resolved by them, that this was a warre intended against the Queene, they agreed that if it had beene of one Townesship or more upon private interest and claime of right of Common, it had not beene Treason; But this was to throw in all inclosures thorough the Kingdome, whereto these parties could pretend no claime; that it was against the Law, in regard that the *Statute* of *Merton* gave power of Inclosures in many Cases. Upon this Resolution *Bradshaw* and *Burton* were executed at *Aynestowe* hill in *Oxford-shire*, the place where they intended their first meeting.

So that, my Lords, if the end of it be to overthrow any of the Statutes, any part of the Law and setled Governement, or any of the great Officers intrusted with the execution of them; this is a warre against the King.

My Lords, it will be further considerable, what shall be accounted a leavying of warre in respect of the Actions and things done; Ther's a designe to alter some part of the Lawes and present Governement, for the effecting thereof people be provided of Armes, gathered together into *troopes*, but afterwards march not with Banners displayed, nor doe *Bellum percutere*. Whether the

arming

arming themselves and gathering together upon this Designe, whether this be a warre or such prosecution of the Design with force as makes it Treason within the *Statute*?

First, If this be not a Warre in respect that it necessarily occasions hostile preparations on the other side?

2. From the words of the *Statute* shall levy warre, and be thereof probably attainted of open Deed by people of their Condition, although the bare conspiring be not an open Deed, yet whether the arming and drawing men together be not an open Declaration of Warre?

In Sir *Thomas Talbots* case before cited in the seventeenth yeere of *Richard* the second, The Acts of force are expressed in the Parliament Roll. That hee caused divers of the people of the County of *Chester* to be armed in a warre-like manner in assemblies; heere is no marching, no banners displayed.

In the eight yeare of *Henry* the 8th. *William Bell* and *Thomas Lacy* in *Com' Kanc.* conspired with *Thomas Cheney*, called the *Hermite* of the Queene of Faires to overthrow the Lawes and customes of the Realme, and for the effecting of it, they with two hundred more met together, and concluded upon a course of raising greater forces in the county of *Kent*, and the adjacent Shires, this adjudged Treason, these were open Actes.

My Lords, for the application of both these to the Case in question.

First in respect of the end of it, here was a warre against the King, It was to subvert the Lawes, This being the designe, for the effecting of it, he assumed to his owne person, an arbitrary power over the lives, liberties and estates of his Majesties Subjects, and determined Causes upon paper Petitions at his owne will and pleasure, obedience must bee forced by the Army, this declared by the Warrant.

My Lords, if it be said, That the Warrant expresseth not any intent of subverting the Lawes, It expresseth fully one of the principall meanes whereby this was to be done, that is, obedience to his arbitrary orders upon paper petitions, this was done in reference to the maine designe.

In the Cases of the Towne of *Cambridge* and Sr. *William Cogan*, that have formerly beene cited to your Lordshippes, upon other occasions, the things in themselves were not Treason, they were not a levying of warre.

In that of *Cambridge*, the Towne met together, and in a forcible manner broke up the University treasury, and tooke out of it the Records and Evidence of the liberties of the University over the Towne.

In the other, they of *Bridgewater* marched to the Hospitall, and compelled the

Master

Master of the Hospitall to deliver unto them certaine Evidences that concerned the Towne, and forced him to enter into a bond of two hundred pound.

These, if done upon these private ends alone, had not beene Treason, as appeares by the very words of the Statute of 25. *Edw.* 3. before mentioned of marching openly or secretly.

But my Lords, these of *Cambridge* and *Bridgewater*, they were of the conspiracy with the villaines, as appeares in the Parliament Roll of the first yeare of *Richard* the second, number the one and thirtieth, and two and thirtieth, where the Townes of *Cambridge* and *Bridgewater* are expressely excepted out of the generall pardon made to the Villaines. This being done in Reference to that designe of the villains of altering the Lawes, this was that which made it Treason.

If the designe went no further then the enforcing obedience to these paper orders made by himselfe, It was sufficient, it was to subvert one fundamentall part of the Lawes, nay in effect the whole Law; what use of Law if hee might order, and determine of mens estates at his owne pleasure; This was against the Law notoriously declared in *Ireland*.

In the close Roll in the Tower, in the five and twentieth yeare of *Edw.* 1. a Writ went

to the Justices in *Ireland*, (that Kingdome at that time was governed by Justices) declaring that upon petitions they were not to determine any titles betweene party and party upon any pretence of profit whatsoever to the King.

In the eight and twentieth yeare of *Henry* the sixt the second Chapter, Suites in equity, not before the Deputy, but in Chancery, Suits at Common Law, not before him, but in Cases of life in the Kings Bench, for title of land or goods in the proper Courts of the Common pleas, or Kings Bench.

This declared in the Instructions for *Ireland* in the latter end of King *James* his time, and by the Proclamation in his Majesties time, my Lord tooke notice of them, called the Commissioners narrow hearted Commissioners.

The Law said, hee should not thus proceed in subversion of it, he saith, he will, and will enforce obedience by the Army. This is as much in respect of the end as to endeavour the overthrow of the Statutes of Laborers, of victualls, or of *Merton* for Inclosures. Here is a warre against the King in respect of the end.

2. In respect of the Actions, whether there be either a levying of warre, or an open deed, or both.

My Lords, there was an Army in *Ireland* at that time of two thousand horse and foot, by

by this Warrant there is a full designation of this whole Army, and an Assignement of it over unto *Savill* for this purpose. The Warrant gives him power from time to time to take as many Souldiers, horse and foot, with an Officer, throughout the whole Army, as himselfe shall please, heere is the terrour and awe of the whole Army to enforce obedience. My Lords, if the Earle had armed two thousand men, horse and foot, and formed them into companies to this end, your Lordships would have conceived that this had beene a warre, It's as much as in the case of Sir *Thomas Talbot* who armed them in assemblies.

This is the same with a breach of trust added to it. That Army was first raised and afterwards committed to his trust for defence of the people, is now destined by him to their destruction. This assignation of the Army by his Warrant under his hand and seale is an open Act.

My Lords, heer's not onely an open act done, but a levying of warre, Souldiers both horse and foot, with an Officer in warlicke manner sessed upon the Subject, which killed their Cattell, consumed and wasted their goods. 2.

O, but five or sixe were the most imployed at any time, a mighty warre of sixe men, scarce a Ryot. *Ob.*

Your Lordships observe a great difference

rence where ſix ſingle men goe upon a deſigne alone, and when ſent from an Army of ſix hundred, all engaged in the ſame ſervice , ſo many were ſent as were ſufficient to execute the Command, if upon a poore man fewer, more upon a rich, if the ſix had not beene able, the whole Army muſt make it good; the reaſon that the Sheriffe alone, or but with one Bayliffe to doe execution, is, becauſe hee hath the Command of the Law, the Kings Writ and the *poſſe Comitatus* in caſe of Reſiſtance ; heer's the warrant of the Generall of an Army, heer's the *poſſe exercitus*, the power of the Army, under this awe of the whole Army, ſix may force more then ſixty without it, and although never above ſix in one place, yet in the ſeverall parts of the Kingdome at the ſame time might be above ſixty ; for ſeſſing of Souldiers was frequent, it was the ordinary courſe for execution of his orders.

The Lord Lieutenant of a County in *England* hath a deſigne to alter the Lawes and governement, nay admit the deſigne goes not ſo high, hee onely declares thus much, that hee will order the freeholds and the eſtates of the Inhabitants of the County at his owne will and pleaſure, and doth accordingly proceed upon paper petitions, foreſeeing there will be diſobedience ; he grants out warrants under his hand and ſeale

to

to the deputy Lieutenants and Captaines of the traine bands, that upon refusall they shall take such number of the traine bands thorow the County with Officers, as they shall think good, and lay them upon the lands and houses of the refusers; Souldiers in a warlike manner are frequently sessed upon them accordingly. Your Lordships doe conceive that this is a levying of Warre within the Statute.

The Case in question goes further in these two Respects.

That it is more against the declared Law in *Ireland*, not onely against the Common Law, but likewise against the Statute of the eight and twentieth yeare of *Henry* the sixt, against the Acts of the Commissioners, against Proclamations in pursuance of the Law, against that himselfe took notice of, Narrow hearted Commissioners. 1.

In this that here was an Army, the Souldiers, Souldiers by profession, Acts of hostility from them of greater Terror then from free-holders of the same County. 2.

My Lords, I have now done with the first of levying warre.

The second is the machination, the advising of a warre; The Case in this rests upon the Warrant to *Savill*, and the advice in the 23 Article. 2.

The Warrant shewes a resolution of employing the old Army of *Ireland*, to the op-

 pression

pression of his Majesties Subjects and the Lawes.

In the 23 Article having told his Majesty that hee was loosed and absolved from rules of Government and might doe every thing which power might admit, hee proceeded further in speech to his Majesty, in these words; You have an Army in *Ireland* you may employ to reduce this Kingdome.

My Lords, both being put together, ther's a machinat ion, a practise, an advise to levy warre, and by force to oppresse and destroy his Majesties Subjects.

It hath beene said, the Statute of 25. *Edw:* 3. is a penall Law, and cannot bee taken by equity and Construction, there must be an actuall warre; the Stature makes it Treason to counterfeit the Kings Coyne, the conspiring, the raising of furnaces is no Treason, unlesse he doth *nummum percutere*, actually coyne.

My Lords, this is onely said, not proved, the Law is otherwise, 19. of *Henry* the sixt, fol. 47. there adjudged that the conspiring and ayding to counterfeit coyne was Treason, and Justice *Stamford*. fol. 3. & 44. is of opinion, That this or conspiring to counterfeit the great Seale is Treason. The Statute is, If any shall counterfeit the great Seale conspiring to doe it by the book is Treason; if a man take the broad Seale from one Pattent, and put it to another,

here

here is hee counterfeiting, its *tunt amount*, and therefore Treason, as is adjudged in 2. *Henry* 4. *fo.* 25. and by the opinion of *Stamford.*

If machination or plotting a warre be not within that clause of the Statute of levying warre, yet its within the first of compassing the death of the King, as that which necessarily tends to the destruction both of the King and of the people, upon whose safety and protection hee is to engage himselfe: That this is Treason hath beene adjudged both after the Statutes of the first of *Henry* the fourth Chapter the tenth, & the first of Queene *Mary* the first Chapter, so much insisted upon on the other side. In the third yeare of King *Henry* the fourth, one *Balshall* comming from *London*, found one *Bernard* at plough in the Parish of *Ofley* in the County of *Hertford. Bernard* asked *Balshall*, what newes, he told him the newes was; That King *Richard* the second was alive in *Scotland* (which was false, for hee was then dead) and that by *Midsomer* next hee would come into *England*; *Bernard* asked him, what was best to be done, *Balshall* answered, get men, and goe to King *Richard.* In *Michaelmas* Tearme, in the third yeare of *Henry* the fourth in the Kings-Bench, rot. 4. this advise of warre adjudged Treason.

In Queene *Maries* time, Sir *Nicholas Throckmorton* conspired with Sir *Thomas*

wyat to levy warre within this Realme for alteration in Religion, he joyned not with him in the execution. This Conspiracy alone declared to be Treason by the Judges. This was after the Statute of the first of Queene *Mary* so much insisted upon. That Parliament ended in *October*, this opinion was delivered the *Easter*-Tearme after, and is reported by Justice *Dyer*, *fo.* 98. It's true, Sir *Thomas Wyat* afterwards did levy warre, Sir *Nicholas Throgmorton* hee onely conspired, this adjudged Treason.

Storie, in Queene *Elizabeths* time, practised with Forreiners to levy warre within the Kingdome, nothing done in pursuance of the practise. The intent without any adhering to Enemies of the Queene or other cause, adjudged to be Treason, and he executed thereupon. It's true my Lords, that yeare 13. *Elizabeth* by Act of Parliament, it's made Treason to intend the levying of warre, this Case was adjudged before the Parliament. The case was adjudged in *Hilarie* Terme, the Parliament began not untill the *April* following; This my Lords, is a Case adjudged in point, That the practising to levy warre, though nothing be done in execution of it is Treason.

Object. It may be objected that in these Cases, the conspiring being against the whole King-

dome

dome included the Queene, and was a compassing her destruction, as wel as of the Kingdomes, heere the advise was to the King.

The Answer is, first, that the warrant was unknowne to his Majesty, that was a machination of warre against the people and Lawes, wherein his Majesties person was engaged for protection. *Answ. 1.*

That the advice was to his Majesty, aggravates the offence, it was an Attempt not only upon the Kingdome, but upon the Sacred Person, and his office too; himselfe was *hostis patriæ*, he would have made the Father of it so too; nothing more unnaturall, more dangerous; To offer the King poyson to drink, telling him that it is a Cordiall, is a compassing of his death. The poyson was repelled, there was an antidote within, the malice of the giver beyond expression. The persuading of Forreiners to invade the Kingdome holds no proportion with this: Machination of warre against the Lawes or Kingdome is against the King they cannot be severed. 2.

My Lords, if no actuall warre within the Statute, if the counselling of a war, if neither of these single Acts be Treason within the Statute; The Commons in the next place have taken it into their consideration, what the addition of his other words, Counsells, and Actions do operate in the Case, and have conceived, That with this addition all being *The 3. General Head.*

put together, that hee is brought within the Statute of 25. *Edward* 3.

The words of the Statute are, if any man shall compasse or imagine the death of the King, the words are not, if any man shall plot or consult the death of the King, no my Lords, they go further then to such things as are intended immediatly, directly, and determinatively against the life and person of the King, they are of a larger extent, to compasse is to doe by Circuit, to consult or practice another thing directly, which being done, may necessarily produce this effect.

However it bee in the other Treasons within this Statute, yet in this by the very words there is roome left for constructions, for necessary Inferences and Consequences.

What hath beene the judgement and practice of former times concerning these words of compassing the Kings death will appeare to your Lordships by some Cases of attainders upon these words.

One *Owen* in King *James* his time in the 13. yeare of his raigne at *Sandwich* in *Kent*, spake these words, *That King* James *being excommunicated by the Pope, may bee killed by any man; which killing is no murther*: being asked by those he spake too, how hee durst maintaine so bloudy an assertion, hee answered that the matter

was

was not so heynous as was supposed; for the King who is the lesser is concluded by the Pope who is the greater, and as a Malefactor being condemned before a Temporall Judge may be delivered over to be Executed, so the King standing convicted by the Popes sentence of excommunication may justly be slaughtered without fault, for the killing of the King is the execution of the Popes supreame sentence, as the other is the execution of the Law; for this, judgement of High-Treason was given against him, and execution done.

My Lords, here is no cleere intent appearing that *Owen* desired the thing should be done, onely Arguments that it might bee done, This is a Compassing, there is a cleare Endeavour to corrupt the judgement, to take off the bonds of Conscience, the greatest security of the Kings life; God forbid saith one of better judgement then hee, That I should stretch out my hand against the Lords annointed, no saith hee, the Lord doth not forbid it, you may for these reasons lawfully kill the King.

He that denies the Title to the Crowne, and plots the meanes of setting it upon another head, may doe this without any direct or immediate desiring the death of him that then weares it, yet this is Treason as was adjudged in 10. *Henry* 7. in the case

case of *Burton* and in the Duke of *Norfolks* case. 13. *Elizabeth*.

This is a compassing of his death, for there can no more be two Kings in one Kingdome, then two Sunnes in the Firmament, he that conceives a title, counts it worth ventring for, though it cost him his life, hee that is in possession thinkes it as well worth the keeping. *John Sparbanke* in King *Henry* the fourths time, meeting two men upon the way, amongst other talke said, that the King was not rightfull King, but the Earle of *March*, and that the Pope would grant indulgencies to all that would assist the Earles title, and that within halfe a yeare there would be no Liveries nor Conizances of the King, that the King had not kept promise with the people but had layed taxes upon them. In *Easter* Tearme in the third yeare of *Henry* the fourth in the Kings Bench Rot. 12. this adjudged Treason. This denying the title with motives though but implyedly of Action against it, adjudged Treason, this is a compassing the Kings death.

How this was a compassing the Kings death is declared in the reasons of the judgement, That the words were spoken with an intent to withdraw the affections of the people from the King, and to excite them against the King, that in the end they might rise up against him *in mortem & destructionem* of the King.

My

My Lords, in this judgement and others which I shall cite to your Lordships, It appeares that it is a compassing the Kings death by words, to indeavour to draw the peoples hearts from the King, to set discord between the King and them, whereby the people should leave the King, should rise up against him to the death and destruction of the King.

The cases that I shall cite prove not onely that this is Treason, but what is sufficient evidence to make this good.

Upon a commission held the 18. yeare of *Ed.4.* in *Kent*, before the *Marquesse of Dorset* & others, an inditement was preferred against *Iohn Awater* of High-Treason, in the forme before mentioned, for words which are entred in the inditement, *sub hâc formâ*, That he had been servant to the Earle of *Warwick*, that though he were dead, the Earl of *Oxford* was alive, and should have the government of Part of the Country, That *Edward* whom you call King of *England* was a false man, and had by art and subtilty slain the Earle of *Warwick* and the Duke of *Clarence* his brother without any cause, who before had been both of them attainted of High-Treason.

My Lords, this Inditement was returned into the Kings Bench in *Trinity* Tearme in the eighteenth yeare of *Edward* the fourth, and in *Easter* Tearme in the two and twentieth yeare of *Edward* the fourth he was outlawed, by the stay of the *outlary* so long

it seems the Iudges had well advised before whether it were Treason or not.

At the same Session, *Thomas Heber* was indited of Treason for these words; *That the last Parliament was the most simple and insufficient Parliament that ever had beene in England. That the King was gone to live in Kent, because that for the present hee had not the love of the Citizens of* London, *nor should hee have it for the futrue. That if the Bishop of* Bath *and* Wells *were dead, the Archbishop of* Canterbury, *being Cardinall of* England, *would immediately lose his head.* This Inditement was returned into the kings Bench in *Trinity* Tearme in the eighteenth yeare of *Edward* the fourth. Afterwards there came a Privy Seal to the Iudges to respit the proceedings, which as it should seeme was to the intent the Iudges might advise of the Case, for afterwards he is outlawed of high-Treason upon this inditemẽt.

These words were thought sufficent evidence to prove these severall inditements, That they were spokẽ to withdraw the peoples affectiõ from the King, to excite them against him, to cause risings against him by the people *in mortẽ & destructionẽ* of the King.

Your Lordships are pleased to consider that in all these Cases, the Treason was for words only, words by private persons, and in a more private manner, but once spoken and no more, only amongst the people, to excite

excite them against the King.

My Lords, here are words, Counsells more then words, and actions too, not only to disaffect the people to the King; but the King likewise towards the people, not once but often, not in private, but in places most publique, not by a privat person, but by a Counsellor of State, a Lord Lieutenant, a Lord President, a Lord Deputie of *Ireland*.

1. To his Majesty, *That the Parliament had denied to supply him*; a slander upon all the Commons of *England* in their affections to the King and Kingdome, in refusing to yeeld timely supply for the necessities of the King and Kingdome.

2. From thence, *that the King was loose and absolved from rules of government, and was to doe every thing that power would admit.* My Lords, more cannot be said, they cannot be aggravated, whatever I should say would be in diminution.

3. Thence, *You have an Army in Ireland, you may imploy to reduce this Kingdome.*

To counsell a King not to love his people is very unnaturall, it goes higher, to hate them, to malice them in his heart; the highest expressions of malice, to destroy them by war: These coales they were cast upon his Majesty, they were blowne, they could not kindle in that breast.

Thence, my Lords, having done the utmost to the King, he goes to the people. At *York* the

Country being met together for Justice, at the open Assizes upon the Bench, he tells them, speaking of the Justices of the peace, *that they were all for Law, nothing but Law, but they should find that the Kings little finger should be heavier then the loines of the Law.*

They shall find, my Lords, who speaks this to the people? a privy Councellor; this must be either to traduce his Majesty to the people as spoken from him, or from himselfe, who was Lord Lieutenant of the Country and President, intrusted with the forces, and Justice of those parts, that he would imploy both this way; adde, my Lords, to his words there the exercising of an arbitrary and vast Jurisdiction before hee had so much as Instructions or colour of warrant.

Thence, we carry him into *Ireland*, there he represented by his place the sacred person of his Majesty.

1. There at *Dublin* the principall City of that Kingdome, whither the subjects of that Country came for Justice, in an assembly of Peeres and others of greatest ranke, upon occasion of a speech of the Recorder of that City touching their Franchises and Legall Rights, he tells them, that *Ireland was a conquered Nation, and that the King might doe with them what he pleased.*

2. Not long after, in the Parliament 10. *Car.* in the chaire of State, in full Parliament, againe, that *they were a conquered Nation, and that*

that they were to expect Lawes as from a Conquerer, before, *the King might doe with them what he would*, now, *They were to expect it, that he would put this power of a Conquerer in execution.* The circumstances are very considerable, in full Parliament, from himselfe in *Cathedrâ*, to the representative body of the whole Kingdome.

The occasion adds much, when they desire the benefit of the Lawes, and that their causes and suites might be determined according to Law, and not by himselfe, as his will and pleasure upon paper Petitions.

3. Upon like occasion of pressing the Lawes and Statutes, that he would make an *act of Councell board in that Kingdome as binding as an act of Parliament.*

4. He made his words good by his actions, assumed and exercised a boundlesse and lawlesse jurisdiction over the lives, persons, and estates of his Majesties Subjects, procured judgement of death against a Peere of that Realme, commanded another to be hanged, this was accordingly executed, both in times of high peace, without any processe or colour of Law.

5. By force for a long time he seised the yarne and flax of the Subjects, to the starving and undoing of many thousands, besides the Tobacco businesse, and many Monopolies, and unlawfull taxes, forced a new oath not to dispute his Majesties royall commands,

determined mens estates at his owne will and pleasure upon paper petitions to himselfe, forced obedience to these, not only by fines and imprisonment, but likewise by the army, sessed souldiers upon the refusers in hostile manner.

6. Was an incendiary of the war between the two Kingdomes of *England* & *Scotland*.

My Lords, we shall leave it to your Lordships judgements, whether these words, counsells, and actions would not have beene a sufficient evidence to have proved an inditement drawne up against him, as those before mentioned, and many others are; that they were spoken and done to the intent to withdraw the Kings heart from the people, and the affections of the people from the King, that they might leave the King, and afterwards rise up against him to the destruction of the King; if so, here is a compassing of the Kings death within the words of the Statute of the five and twentieth yeare of *Edward* the third, and that warranted by many former judgements.

The 4. general head. My Lords, I have now done with the three Treasons within the Statute of the five and twentieth of *Edward* the third. I proceed to the fourth upon the Statute of the eighteenth yeare of *Henry* the sixt, Chapter the third, in *Ireland*; I shall make bold to read the words to your Lordships.

That no Lord, nor any other of what condition

soever

soever he be, shall bring or lead hoblers, kerves, or hooded men, nor any other people, nor horses to ly on horseback or on foot upon the Kings subjects without their good will & consent, but upon their own costs, & without hurt doing to the commons, and if any so do he shall be judged as Traytor.

1. The Argument that hath beene made concerning the Person, That it extends not to the King, and therefore not to him, weighs nothing with your Lordships *Rex non habet in regno parem*, from the greatnesse of his office to argue himselfe into the same impossibility with his sacred Majesty of being uncapable of high-treason, it's an offence, no reason, the words in the Statute, *No Lord nor any other of what condition soever he bee*, includes every subject.

In *Trinity* Terme in the three and thirtieth year of *Henry* the eight, in the Kings bench, *Leonard* Lord *Gray*, having immediately before been Lord Deputy of *Ireland* is attainted of high-treason, & judgment given against him for letting divers rebells out of the Castle of *Dublin*, and discharging Irish hostages and pledges that had been given for securing the peace, for not punishing one that said the King was an Heritique. I have read the whole Record, there is not one thing laid to his charge, but was done by him as Lord Lieutenant: hee had the same plea with my Lord of *Strafford*, that these things were no adhering to the Kings enemies, but

were

were done for reasons of State, That he was not within those words of the Statute of the five and twentieth yeare of *Edward* the third, himselfe being Lord Lieutenant there, they cost his life.

Object. 2. It hath been said, That the Souldiers sessed upon the Subjects by him, were not such persons as are intended by that Statute, *Hoblers*, *Kerves*, *and hooded men*, these rascall people.

Answ. My Lords, they were the names given to the Souldiary of those times, Hoblers horsemen, the other the foot, but the words of the Statute goe further, *Nor any other people, neither horse nor foot*; his Lordship sessed upon them both horse and foot.

Object. 3. The Statute extends only to them that lead or bring, *Savill* led them, my Lord only gave the warrant.

Answ. To that I shall say only thus, *plus peccat author quam actor*, by the rule of Law, *agentes & consentientes pari plectuntur pœnâ*, it consent, much more a command to doe it, makes the commander a Traitor. If there bee any Treason within this Statute, my Lord of *Strafford* is guilty.

Object. 4. It hath been therfore said, That this Statute like *Gelab's* sword hath beene wrapt up in a cloth and laid behind the doore, that it hath never been put in execution.

Answ. My lords, if the Clark of the Crewne in *Ireland* had certified your Lordships that

that upon search of the Judgements of Attainders in Ireland, hee could not finde that any man had bin attainted upon the Statute, your Lordships had had some ground to believe it, yet its only my Lord of Straffords affirmation. Besides, your Lordships know that an Act of Parliament bindes untill it be repealed.

It hath bin therefore said, that this Statute is repealed by the Statutes of the eight yeare of *Edward* the fourth, the first Chapter, and of the tenth yeare of *Henry* the seventh, the 22. Chap. because by these two Statutes the English Statutes are brought into Ireland.

The argument (if I mistooke it not) stood thus, That the Statute of the first of *Henry* the fourth, the 10. Chapter, saith, That in no time to come, Treason shall be adjudged otherwise, then it was ordained by the Statute of the 25. yeare of *Edward* the third, That the Treason mentioned in the 18. yeare of *Henry* the sixt in the Irish Statute is not contained in the Statute of the 25. yeare of *Edward* the 3. and therefore being contrary to the Statute of the first of *Henry* the fourth, it must needs be void.

My Lords, the difference of the times wherein the Statute of the first year of *Henry* the fourth, and that of the 18. yeare of *Henry* the sixt were made, cleares the point, as is humbly conceived; that of *Henry* the sixt was made 40. yeares after the other.

The Statute of the eight yeare of *Edward* the fourth, and the tenth of *Henry* the 7. bringing in the English Statutes in order and series of time, as they were made one after another (as afterwards is proved they did) it cannot be that the Statute of the first yeare of *Henry* the fourth made forty yeare before, should repeale or make voide the Statute of the 18. *Henry* the sixt made so long after. The rule of Law is that *Leges posteriores priores abrogant*, than latter Lawa repeale former, but by this construction a former Law should repeal and make voide a *Non ens*, a Statute that then was not.

If this were Law, then all the Statutes that made any new Treason after the first yeare of *Henry* the fourth were voide in the very fabricke, and at the time when they were made; hence likewise it would follow that the Parliament now upon what occasion soever hath no power to make any thing treason not declared to be so in the Statute of the five and twentieth yeare of *Edward* the third, this your Lordships easily see would make much for my Lord of *Straffords* advantage, but why the Law should bee so, your Lordships as yet have onely heard an affirmation of it, no reason.

But some touch was given that this Statute

Statute of the tenth yeere of *Henry* the seventh in words makes all the Irish Statutes voide, which are contrary to the English. The Answer to this is a deniall that there are any such words in the Statute: This Statute declares, that the English Statutes shall bee effectuall and confirmed in *Ireland*, and that all Statutes, before time, made to the contrary shall bee revoked; this repeales onely the Irish Statutes of the tenth yeere of *Henrie* the fourth, and the nine and twentieth yeere of *Henrie* the sixt, which say that the English Statutes shall not bee in force in Ireland, unlesse particularly received in Parliament, it makes all the Irish Statutes void, which say that the English Statutes shall not be in force there.

It is usuall when a Statute saith, that such a thing shall be done or not done, to adde further, that all Statutes to the contrary shall be void.

No likelihood that this Statute intended to take away any Statute of Treason; when but in the Chapter next before this, Murder there is made Treason, as if done upon the Kings person.

That this Statute of the eighteenth yeare of *Henry* the sixt remaines on foot, and not repealed either by the Statute of

the eighth yeare of *Edward* the fourth, or this of the tenth yeare of *Henry* the seventh appeares expressely by two severall Acts of Parliament made at the same Parliament of the tenth yeare of *Henry* the seventh.

By an Act of Parliament in *Henry* the sixt time, in Ireland it was made Treason for any man to procure a privie Seale, or any other Command whatsoever, for apprehending any person in Ireland for Treason done without that Kingdome, and to put any such Command in execution; divers had beene attainted of Treason for executing such Commands: Here is a Treason so made by Act of Parliament in *Henry* the sixt time: In the third Chapter of this Parliament of the tenth of *Henry* the seventh, an Act is passed for no other end then to repeale this Statute of *Henry* the sixt of Treason.

If this Statute of *Henry* the sixt of Treason, had beene formerly repealed by the Statute of 8. *Edw.* 4. or then by the two and twentieth Chapter of this Parliament of 10. *H.* 7. by bringing in the English Statutes, the Law-makers were much mistaken now to make a particular Act of Parliament to repeale it, it being likewise so unreasonable an Act as it was.

In the eighth Chapter of this Parliament of the tenth of *Henry* the seventh, it is enacted, That the Statutes of *Kilkenny*, and all other Statutes made in Ireland (two onely excepted, whereof this of the eighteenth of *Henry* the sixt is none) for the Commonweale shall be enquired of and executed. My Lord of Strafford saith, that the bringing in of the English Statutes hath repealed this Statute of the eighteenth yeare of *Henry* the sixt, the Act of Parliament made the same time saith no; it saith that all the Irish Statutes, excepting two, whereof this is none, shall still be in force.

Object. Oh! But however it was in 10. *Henry* 7. yet it appeareth by Judgement in Parliament afterwards, That this Statute of the eighteenth yeare of *Henry* the sixt is repealed, and that is by the Parliament of the eleventh yeare of Queene *Elizabeth*, the seventh Chapter, *That by this Parliament it is enacted, that if any man without license from the Lord Deputy, lay any Souldiers upon the Kings subjects, if he be a Peere of the Realme, he shall forfeit one hundred pounds, if under the degree of a Peere, a hundred markes.* This Statute as is alledged, declares the penalty of laying souldiers upon the Subjects to be only a hundred pounds, and therefore it is not Treason.

Answer. My Lords, if the offence for which this penalty of one hundred pounds is laid upon the offender, bee for laying Souldiers, or leading them to doe any acts offensive, or invasive upon the Kings people, the Argument hath some force; but that the offence is not for laying Souldiers upon the true subjects, that this is not the offence intended in the statute, will appeare to your Lordships, *Ex absurdo*, from the words of it.

The words are, *That if any man shall assemble the people of the County together, to conclude of peace or warre, or shall carry those people to doe any Acts offensive or invasive, then bee shall forfeit one hundred pounds.* If concluding of warre, and carrying the people to Acts invasive, bee against the Kings Subjects, this is high Treason within the words of the Statute of the five and twentieth yeare of *Edward* the third; For if any Subject shall assemble the people, and conclude a warre, and accordingly shall lead them to invade the Subject, this is a levying of warre within the words of that Statute; and then the Statutes of the five and twentieth yeas of *Edward* the third; the first of *Henry* the fourth; and the first of Queen *Mary*, which the Earle of *Strafford* in his Answer desires to bee tryed by, are as well repealed in this point as

the

the Statute of the eighteenth yeare of *Henry* the sixt, he might then without feare of treason have done what he pleased with the Irish army; for all the Statutes of levying warre by this Statute of the eleventh yeare of Queene *Elizabeth* were taken out of his way.

In *Ireland* a subject gathers forces, concludes a warre against the Kings people, actually invades them; blood-shed, burning of houses, depredations ensue; two of those, that is murder and burning of houses are treason, and there the other felony; by this construction the punishment of treason and felony is turned onely into a fine of one hundred pounds, from losse of life, lands and all his goods, onely to losse of part of his goods. 2.

The third absurdity, a warre is concluded, three severall inrodes are made upon the subjects, in the first a hundred pound damage, in the second, five thousand pound damage; in the third, ten thousand pound damage is done to the subjects, the penalty for the last inrode is no more then for the first, only one hundred pounds. This Statute by this construction tells any man how to get his living without long labour. 3.

Two parts of the hundred pounds is given to the King, a third part to the informer, 4.

here's

here's no damage to the Subject that is robbed and destroyed.

My Lords, the Statute will free it selfe and the makers of it from these absurdities.

The meaning of this Statute is, *That if any Captaine shall of his owne head conclude of peace or warre against the Kings enemies or rebels*; or shall upon his own head invade them, without warrant from the King or the Lord Deputy of Ireland, that then he shall forfeit a hundred pounds.

The offence is not for laying of souldiers upon the Kings people, but making of warre against the Irish rebels without warrant; the offence is not in the matter, but in the manner, for doing a thing lawfull, but without mission.

1. This will appeare by the generall scope of the Statute, all the parts being put together.

2. By particular clauses in the Statute: And,

3. By the Condition of that Kingdome at the time of the making of that Statute.

For the first, The preamble recites that in time of declination of Justice under pretext of defending the countrey, and themselves, divers great men arrogated to themselves regall authority under the names of captains, that they acquired to themselves that govern-

[illegible] which belonged to the [illegible] for [illegible] that no man dwelling within the [illegible] grounds, shall the accounts assume or take upon himself the authority or power of a Captaine within the [illegible] without licence [illegible] nor shall any Captaine or Gunner of any ship make any demand of the people of any exaction, nor any Captaine of the people of the Shire grounds [illegible] Captaine shall lade any goods [illegible] any act, [illegible] or [illegible] rant under the great Seale of [illegible] the Lord Deputie upon penalty that shall do any thing contrary to that [illegible] [illegible] shall forfeit [illegible]

My Lords the Rebells [illegible] the Courts of justice [illegible] the Country diverse usurped the [illegible] Captaines, concluded of [illegible] the Rebells, invaded the [illegible] invading the Rebells without [illegible] the crime.

This appears further by particular clauses in the Statute, none shall [illegible] any Captaine ship within the Shire grounds, or assemble the people of the Shire grounds to conclude of Warre, or [illegible] invasion.

This that had [illegible] tended to this end, that [illegible]

the *Irish* paleagainst within the Shires grounds [illegible] pale, which [illegible] [illegible] were without the pale, the [illegible] always disorder in [illegible] of [illegible] upon leagues, and [illegible] from [illegible] the peace, and [illegible] made had our [illegible] upon that occasion in *England* and *Wales* to were there Marches between the [illegible] and *Irish* pale, wherein do in the [illegible] [illegible] by this benefit to [illegible] the Country against the *Irish*, as appeares in the close Rolls of the Tower in [illegible] year of *Edward* the third, [illegible] [illegible] and in [illegible] [illegible] year of *Edward* the third, [illegible] the *English* pale was almost destroyed by the *Irish* enemies, and that there was no way to prevent [illegible] but only that the Owners [illegible] their handes for defence, and that [illegible] should be a forfeiture, this act of Parliament in a great counsell there was affirmed, as appeares in the close Roll, the [illegible] year of *Edward* the third, [illegible] clauses in the Statute, none [illegible] [illegible] years, as appeares in the Statute of [illegible] year of *Henry* the 6. [illegible] this land they continued between the *English* marches and the *Irish* enemies, [illegible] difference [illegible] the *English* marches and their

in their Apparell, did daily not being known to the *English*, that [illegible] pale. Therefore he [illegible] distinction pale. This hostility [illegible] till the ninth year of [illegible] as appeares by the [illegible] many the Severals, the Severalties [illegible] ter, and so successively downwards till the making of this Act, [illegible] the elements [illegible] as appeares fully in the [illegible] ter, in [illegible] to the Play immediately before said, at the time of the making of this Statute, there was also one [illegible] of the Shire grounds [illegible] and *Irish* pale, but open Warre and Acts of hostility [illegible] no lesse [illegible] selfe, for [illegible] tate is the Attainder of [illegible] who had made open warre, [illegible] in open Warre. Its there declared, that he had gotten by force all the Nord of *Irelaud* for an hundred and twenty miles in length, and twoyes in breadth, that he had mastered diverse places within the *English* pale; when the flame of this warre by his death immediately before this Statute was spent, yet the fire brands which not all quenched for the reduction [illegible]

[illegible] called [illegible] Queen [illegible] Queen Elizabeth in Ireland, [illegible] the eleventh year of Queen Elizabeth, where they are [illegible] for levying Warre against [illegible] in this Statute was made [illegible] Lords immediately before, and at the time of the making of this Statute, the levying Warre between those of the Shire grounds mentioned in this Statute; and the first, the concluding of Warre, and Acts offensive and invasive there mentioned, can be intended by [illegible] but the [illegible] Again the words of the Statute are [illegible] shall assemble the people of the Shire grounds, or conclude of peace or warre, it is to be presumed that those of the Shire grounds will conclude of Warre against themselves; nor saith the Statute shall carry those of the Shire grounds to do any Acts invasive, by the construction which is made on the other side, they must be carried to fight against themselves.

Lastly the words are, as Captaine none shall assume the name or authority of a Captaine, or as a Captaine shall gather the peo-

people together, or as a Captaine leade them. The offence is not in the matter, but in the manner. If the acts offensive were against the Kings good subjects, those that were under command were punishable, as well as the Commanders, but in respect the Souldiers hand the service to be good in a false being against the enemies, and that it was not for them to dispute the authority of their commanders, the penalty of a 100. pounds is laid onely upon him, that as Captaine shall assume this power without warrant, the people commanded are not within the Statute.

My Lords, the logicke whereupon this argument hath been framed stands thus, because the Statute of the eleventh yeare of Queene *Elizabeth* inflicts a penalty of a 100. pound, and no more upon any man, that as a Captaine without warrant, and upon his owne head shall conclude of, or make Warre against the Kings enemies, therefore the Statute of the 13. yeare of *Henry* the first, is repealed, which makes it treason to lay Souldiers upon, or levy warre against the Kings good people.

But my Lords observation hath bin made upon other words of this statute, that is that without licence of the deputy, those things cannot bee done; This shewes, that the deputy is within none of these Statutes.

My Lords, this Argument standes upon

the

the same reason with the former, because he hath the ordering of the Army of *Ireland* for the defence of the people, and may give warrant to the Officers of the Army upon [illegible] occasions of invasion to resist or prosecute the enemy, because of the danger that else might ensue forthwith by staying for a warrant from his Majesty out of *England*. Therefore it is no treason in the Deputy to employ the Army in *Ireland* whensoever he pleaseth for the subversion of the Kings good people and of the Lawes.

My Lords, the Statute of the eleventh yeare of *Henry* the seaventh, the seaventeenth Chapter, touched upon for this purpose, cleares the business in both points, for there it is declared that none ought to make warre upon the *Irish* rebells and enemies without warrant from the Lieutenant, the forfeiture a hundred poundes as here the Statute is therewith, and might as well have beene cited for repealing the Statute of the eighteenth yeare of *Henry* the first, as this of the eleaventh yeare of Queene *Elizabeth*: but if this had beene insisted upon it would have expounded the other two cleare against him.

Obj. My Lords, it hath beene further said although the statute bee in force, and there be a treason within it, yet the Parliament hath no jurisdiction, the treasons are committed in *England*, therefore not triable here.

My

My Lords, Sir *John Perrot* his predecessors in the 24. yeare of Queene *Elizabeth* was tried in the Kings bench for treason done in *Ireland*, when he was Deputy; and *Drake* in the 33. yeare of Queene *Elizabeth* judged heere for treason done in *Ireland*. *Answ.*

But it will bee said, these trialls were after the Statute of the foure and thirtieth yeare of *Henry* the eighth, which enacts, that treasons beyond sea may bee tried in *England*. *Obj.*

My Lords, the predecessor my Lord *Gray* was tried and adjudged here in the Kings bench, that was in Primo Reginæ in the thirteenth and thirtie yeare of *Henry* the eighth; this was before the making of that Statute. *Answ.*

To this againe will bee said, that it was for treason by the Lawes and Statutes of *England*, but this is not for any thing that's treason by the Law of *England*, but by an *Irish* Statute. *Obj.*

So that the question is onely whether your Lordships in Parliament heere have cognizance of an offence made treason by an *Irish* Statute in the ordinary way of judicature without bill, for so is the present question.

But the clearing of this I shall proceed to declare to your Lordships concerning

Whether

Whether the rule for expounding the Irish Statutes, and customes bee one, and the same in *England* as in *Ireland*.

These being admitted whether the Parliaments in *England* have cognizance or jurisdiction of things there done in respect of the place, because the Kings writ runnes not there.

For the first, if in respect of the place, the Parliament here hath no cognizance there, And secondly, if the rule for expounding the *Irish* Statutes and Customes bee the same here as there, also exception I humbly conceive must fall away.

In *England* there is the common law, the Statutes, the acts of Parliament and customes peculiar to certaine places differing from the common law, if any question arise concerning either a custome or an act of Parliament, the common law of *England*, the first, the primative and the generall law, gives the rule and expositon of them and of their severall extents, it is so here, it is so in *Ireland*, the common law of *England* is the common law of *Ireland* likewise, the same here and there in all the parts of it.

It was introduced into *Ireland* by King *John*, and afterwards by King *Henry* the third, by act of Parliament held in *England* as appeareth by the antient Rolls of the 20. years of King *Henry* the third, the first

membrana. The words are, *Quia pro communi utilitate terræ Hibernie, & omnium terrarum Regis, Rex vult, & de communi consilio Regis provisum est, quod omnes leges & consuetudines quæ in regno Angliæ tenentur, in Hibernia teneantur, & eadem terra eisdem legibus subjaceat & per easdem regatur, sicut Dominus* Johannes *Rex cum ultimo esset in Hibernia statuit, & fieri mandavit. Quia &c. Rex vult quod omnia brevia de communi Iure quæ currant in Anglia, similiter currant in Hibernia sub novo sigillo Regis, mandatum est Archiepiscopis, &c. quod pro pace & tranquillitate ejusdem terræ, per easdem leges ea regi & dedici permittant, & ea in omnibus sequantur. In cujus &c. Teste Rege, apud woodstock, decimo nono die Septembris.*

Here's an union of both Kingdomes, and that by act of Parliament, and the same Lawes to bee used here as there, in *omnibus.*

My Lords, That nothing might bee left here for an exception, that is, that in treasons, felonies, and other capitall offences concerning life, the Irish lawes are not the same as here, Therefore it is enacted in a Parliament held in *England* in the fourteenth yeere of *Edward* the second (it is not in print neither, but is in the Parliament book) That the Laws concerning life and member shall be the same in Ireland as in England.

And that no exception might yet remaine,

 in

in a Parliament held in England, the fifth yeere of *Edward* the third, It is enacted, *quod una & eadem Lex sit tam Hibernicis quam Anglicis.* This Act is enrolled in the Patent rolls of the fifth yeere of *Edward* the third, *part* 1. *memb.* 25.

The Irish therefore receiving their Lawes from hence, they send their Students at Law to the Innes of Courts in England; where they receive their degree; and of them, and of the common Lawyers of this Kingdome are the Judges made.

The petitions have beene many from Ireland, to send from hence some Judges more learned in the Lawes than those they had there.

It hath been frequent in cases of difficulty there, to send sometimes to the Parliament here, sometimes to the King by advice from the Judges here, to send them resolutions of their doubts: Amongst many I'le cite your Lordships only one, because it is in a case of Treason upon an Irish Statute, and therefore full to this point.

By a Statute there made in the fifth yeere of *Edward* the fourth, there is provision made for such as upon suggestions are committed to prison for Treason, that the party committed, if he can procure 24 Compurgators, shall be bailed, and let out of prison.

Two Citizens of Dublin were by a grand Jury presented to have committed Treason;

They

They desired the benefit of this Statute, that they might be let out of prison upon tender of their Compurgators. The words of the Statute of the fifth yeer of *Edward* the fourth in Ireland being obscure, the Judges there not being satisfied what to doe, sent the case over to the Queene, desired the opinion of the Judges here; which was done accordingly: The Judges here sent over their opinion, which I have out of the Book of Justice *Anderson*, one of the Judges consulted withall. The Judges here delivered opinion upon an Irish Statute in case of Treason.

If it be objected, That in this case the Judges here did not judge upon the party; their opinions were onely *ad informandam conscientiam* of the Judges in Ireland; that the judgement belonged to the Judges there:

My Lords, with submission, this and the other Authorities prove that for which they were cited; that is, That no absurdity, no failer of Justice would ensue if this great Judicatory should judge of Treason so made by an Irish Statute.

The common Law, the rule of Judging upon an Irish Statute, the pleas of the Crown for things of life and death, are the same here & there. This is all that hath yet been offered.

For the second point, That England hath no power of Judicature for things done in Ireland; My Lords, the constant practice of all ages proves the contrary.

Writs of errour in Pleas of the Crowne as well as in civill causes, have in all Kings reignes been brought here, even in the inferiour Courts of Westminster Hall, upon judgements given in the Courts of Ireland: The practice is so frequent, & so well known, as that I shal cite none of them to your Lordships: no president will I beleeve bee produced to your Lordships, that ever the case was remanded back againe into Ireland, because the question rose upon an Irish Statute or custome.

Obj. But it will be said, That writs of errour are only upon a failer of justice in Ireland; and that suits cannot originally bee commenced here for things done in Ireland, because the the Kings writ runs not in Ireland.

Answ. This might bee a good plea in the Kings Bench, and inferiour Courts at Westminster Hall; the question is, whether it be so in Parlament. The Kings writ runs not within the County Palatine of Chester and Durham, nor within the five Ports, neither did it in Wales before the union in *Henry* the eighth's time; after the Lawes of England were brought into Wales in King *Edward* the first's time, suits were not originally commenced in Westminster Hall, for things done in them, yet this never excluded the Parliament: suits for life, lands, and goods within those jurisdictions are determinable in Parliament, as well as in any other parts of the Realme.

Ireland

Ireland, as appeares by the Statute of the thirtieth yeer of *Henry* the third, before mentioned, is united to the Crown of England.

By the Statute of the eight and twentieth yeere of *Henry* the sixth in Ireland, it is declared in these words; That Ireland is the proper Dominion of England, and united to the Crown of England, which Crowne of England is of it selfe, and by it selfe, fully, wholly, and entirely endowed with all power and authority sufficient to yeeld to the subjects of the same full and plenary remedy in all debates and suits whatsoever.

By the Statute of the three and thirtieth yeer of *Henry* the eighth, the first Chapter, when the Kings of England first assumed the title of King of Ireland, it is there enacted, That Ireland still is to bee held as a Crown annexed and united to the Crown of England.

So that by the same reason, from this, that the things wherein runs not in Ireland, it might as well bee held, that the Parliament cannot originally hold plea of things done within the County Palatine of Chester & Durham, nor within the five Ports & Wales; Ireland is part of the Realm of England, as appears by those Statutes, as well as any of them.

This is made good by constant practice in all the Parliament rolls, from the first to the last, there be receivers and tryers of peitions appointed for Ireland. For the Irish to come so farre with their peitions for justice, and the Parliament not to have cognizance, which from time to time they had in

the

the beginning of the Parliament appointed receivers and tryers of them, is a thing not to bee presumed.

An appeale in Ireland brought by *William* Lord *Vescy* against *John Fitz-Thomas*, for treasonable words there spoken, before any Judgement given in the case there, was removed into the Parliament in England, and there the defendant acquitted, as appeares in the Parliament pleas of the two and twentieth yeere of *Edward* the first.

The suits for lands, offices, and goods, originally begun here, are many; and if question grew upon matter in fact, a Jury usually ordered to try it, and the verdict returned into Parliament, as in the case of one *Ballibeu*, in the Parliament of the five and thirtieth yeere of *Edward* the first. If doubt arose upon a matter triable by Record, a writ went to the Officers in whose custody the Record remained to certifie the Record, as was in the case of *Robert Bagot* the same Parliament of the five and thirtieth yeere of *Edward* the first, where the writs went to the Treasurer and Barons of the Exchequer.

Sometimes they gave judgement here in Parliament, and commanded the Judges there in Ireland to doe execution, as in the great case of Partition between the co-parceners of the Earle Marshall in the Parliament of the three and thirtieth yeere of *Edward* the first, where the writ was awarded to the Treasurer of Ireland.

My Lords, The Lawes of Ireland were introduced by the Parliaments of England, as appears

by three Acts of Parliament before cited.

It is of higher jurisdiction *Lex Regis*, than to judge by them.

The Parliaments of England doe binde in Ireland, if Ireland bee particularly mentioned, as is resolved in the Book case of the first yeere of *Henry* the seventh, *Cokes* seventh Report, *Calvins* case, and by the Judges in Trinity Terme, in the three and thirtieth yeere of Queene *Elizabeth*. The Statute of the eighth yeere of *Edward* the fourth, the first Chapter in Ireland recites, that it was doubted amongst the Judges, whether all the English Statutes, though not naming Ireland, were in force there; if named, no doubt.

From King *Henry* the third his time downward to the eighth yeere of Queene *Elizabeth* (by which Statute it is made felony to carry sheep from Ireland beyond seas) in almost all these Kings reignes there be Statutes made concerning Ireland.

The exercising of the *Legislative* power there over their lives and estates is higher than of the Judiciall in question. Untill the nine and twentieth yeere of *Edward* the third, erroneous judgements given in Ireland, were determinable no where but in England; no, not in the Parliaments of Ireland, as it appeares in the close rolls in the Tower, in the nine and twentieth yeere of *Edward* the third, *memb.* 12. Power to examine and reverse erroneous judgements in the Parliaments of Ireland is granted from hence; Writs of errour lie in the Parliament here upon erroneous judgements after that time

time given in the Parliaments of Ireland, as appears in the Parliament rolls of the eighth yeere of *Henry* the sixth, *no.* 70. in the case of the Prior of Lentham. It is true, the case is not determined there, for it's the last thing that came into the Parliament, and could not be determined for want of time; but no exception at all is taken to the jurisdiction.

The Acts of Parliament made in Ireland have been confirmed in the Parliaments of England, as appears by the close rolls in the Tower, in the two and fortieth yeere of *Edward* the third, *membrana dorsal*, where the Parliament in Ireland, for the preservation of the Countrey from the Irish, who had almost destroyed it, made an Act, that all the land-owners that were English should reside upon their lands, or else they were to be forfeited: This was here confirmed.

In the Parliament of the fourth yeere of *Henry* the fifth, *chap.* 6. Acts of Parliament in Ireland are confirmed, and some priviledges of the Peeres in the Parliaments there are regulated.

Power to repeale Irish Statutes, power to confirme them, cannot bee by the Parliament here, if it hath not cognizance of their Parliaments, unless it be said, That the Parliament may doe it knowes not what.

Garnesey and Jersey are under the Kings subjection, but are not parcels of the Crowne of England, but of the Dutchy of Normandy; they are not governed by the Lawes of England, as Ireland is; and yet Parliaments in England have usually held ple

of,

of, and determined all causes concerning lands or goods. In the Parliament of 33. *E.1.* there be *placita de Insula Iernesey*; and so in the Parliament 14. *E.2.* and so for Normandy and Gascoyne; and alwayes as long as any part of France was in subjection to the Crown of England, there were, at the beginning of the Parliaments, receivers and tryers of petitions for those parts appointed.

My Lords, I beleeve your Lordships will have no cases shewed of any plea to the jurisdiction of the Parliaments of England, in any things done in any parts wheresoever in subjection to the Crown of England.

The last thing I shall offer to your Lordships is the case of 19. *El.* in my Lord *Dyer* 306. and Judge *Cromptons* book of the jurisdiction of Courts, *fol.* 23. The opinion of both these Books is, That an Irish Peer is not triable here; It's true, a Scotish or French Nobleman is triable here as a common person; the Law takes no notice of their Nobility, because those Countries are not governed by the Lawes of England; but Ireland, being governed by the same Laws, the Peers there are triable according to the Law of England, onely *per pares*.

My Lords, By the same reason the Earle of Strafford, not being a Peer of Ireland, is not triable by the Peers of Ireland; so that if hee bee not triable here, he is triable no where.

My Lords, In case there be a Treason and a Traitor within the Statute, & that he be not triable here for it in the ordinary way of judicature, if that juris-

diction failes, this by way of Bill doth not; Attainders of Treason in Parliament are as legall, as usuall by Act of Parliament as by Judgement.

I have now done with the Statutes of 25. *E.* 3. and 18. *H.* 6. My Lord of Strafford hath offended against both the Kingdomes, and is guilty of high Treason by the Lawes of both.

5 My Lords, In the fifth place I am come to the Treasons at the common Law, The endevouring to subvert the fundamentall Lawes and governement of the Kingdome, and to introduce an arbitrary and tyrannicall governement.

In this I shall not at all labour to prove, that the endevouring by words, counsels, and actions to subvert the Lawes, is treason at the common Law, if there be any common Law treasons at all left? nothing treason, if this not, to make a Kingdome no Kingdome: take the polity and government away, England's but a piece of earth, wherin so many men have their commorancy and abode, without ranks or distinction of men, without property in any thing further than possession; no Law to punish the murdering or robbing one another.

That of 33. *H.* 8 of introducing the Imperiall Law, sticks not with your Lordships: It was in case of an appeal to Rome; these appeals in cases of marriages, & other causes counted Ecclesiasticall, had been frequent, had in most Kings reigns been tolerated; some in times of Popery put a conscience upon them, the Statutes had limited the penalty to a *Premunire* only: Neither was that a totall subversion, only an Appeale

peale from the Ecclesiasticall Court here in a single cause, to the Court at Rome; and if treason or not, that case proves not; a treason may be punished as a felony, a felony as a trespasse, if his Majesty so please; the greater includes the lesser: In the case of *Premunire* in the Irish reports, that which is there declared to be treason, proceeded upon only a as *Premunire*.

The thing most considerable in this, is whether the treasons at common Law be taken away by the Stat. of 25. *E.* 3. 1. *H.* 4. or 1. *Q. M.* or any of them.

My Lords, To say they bee taken away by the Stat. of 25. *E.* 3. is to speak against both the direct words and scope of that Statute.

In it there's this clause, *That because many other like cases of treason might fall out which are not there declared, therefore it is enacted, That if any such case come before the Iudges, they shall not proceed to judgement till the case bee declared in Parliament, whether it ought to be adjuged treason, or not.*

These words, and the whole scope of that Statute showes, That it was not the meaning to take away any treasons that were so before, but onely to regulate the jurisdiction and manner of tryall. Those that were single & certain Acts, as Conspiring the Kings death, Levying warre, Counterfeiting the money, or great Seal, Killing a Judge, these are left to the ordinary Courts of Justice: The others not depending upon single Acts, but upon constructions and necessary inferences, they thought it not fit to give the inferiour Courts so great a latitude here, as too dangerous to the subject, those they strained to the Parliament.

 This

This Statute was the great security of the subject, made with such wisdome as all the succeeding ages have approved it: It hath often passed through the fornace, but, like gold, hath lost little or nothing.

The Statute of 1. *H.4.cap.* 10. is in these words, *Whereas in the Parliament held the 21. yeere of* Richard *the second, divers paines of treasons were ordained, insomuch, that no man did know how to behave himselfe, to doe, say, or speak. It is accorded, that in no time to come any treason bee adjudged otherwise than it was ordained by the Statute of* 25. E. 3.

It hath beene said, To what end is this Statute made if it takes not away the common Law treasons remaining after the Statute of 25. E. 3?

There bee two maine things which this Statute doth; First, it takes away for the future all the Treasons made by any Statute since 25. *E.* 3. to 1. *H.* 4. even to that time: For, my Lords, In respect that by another Act in that Parliament, the Statute of 21. *R.* 2. was repealed, it will not bee denyed, but that this Statute repeales more treasons than these of 21. *R.* 2. it repeales all Statute treasons but those in 25. *E.* 3.

Secondly, It not only takes away the Statute treasons, but likewise the declared treasons in Parliament after 25. *E.* 3. as to the future. After declaration in Parliament, the inferior Courts might judge these treasons; for the declarition of a treason in Parliament, after it was made, was sent to the inferiour Courts, that *toties quotiens* the like case fell out, they might proceed therein: the subject for the future

was

was secured against these; so that this Statute was of great use.

By the very words of it, it still referrs all treasons to the provision of 25.E.3: it leaves that entire and upon his old bottome.

The Statute of 1. Q.M. cap. 1. saith, *That no offences made treason by any Act of Parliament, shall henceforth be taken or adjudged to be treason, but onely such as be declared and expressed to be treason by the Statute of 25. E. 3. concerning treason, or the declaration of treason, and no others: And further provides that no paines of death, penaltie, or forfeiture, in any wise shall ensue for committing any treason, other than such as be in the Statute of 25.E.3. ordained and provided; any Acts of Parliament or any declaration, or matter to the contrary, in any wise notwithstanding.*

By the first part of this Statute, onely offences made Treason by Act of Parliament, are taken away, the Common Law Treasons are no way touched. The words (*and no others*) referre still to offences made treason by Act of Parliament, they restraine not to the treasons only particularly mentioned in the Statute of 25. E.3. but leave that Statute entire as to the common Law treason, as appears by the words immediately foregoing, or the declaration of Treason.

By the second part, for the paines and forfeitures of treasons, if it intend only the punishment of treason, or if it intend both treason and punishment, yet all is referred to the provision and ordinance of 25. E.3. any Act of Parliament or other declaration or thing notwithstanding.

It

It saith not, other than such penalties or treasons as are expressed and declared in the Statute of 25. *E.* 3. that might perhaps have restrained it to those that are particularly mentioned: No, it referrs all treasons to the generall ordination and provision of that Statute, wherein the common-Law-treasons are expresly kept on foot.

If it bee askt what good this Statute doth, if it take not away the common Law-treasons.

1. It takes away all the treasons made by Act of Parliament, not onely since the first of *H.* 4. which were many, but all before 1. *H.* 4. even untill 25. *E.*3. by expresse words.

2. By expresse words, it takes away all declared treasons, if any such had been made in Parliament: these for the future are likewise taken away; so that whereas it might have been doubted, whether the Statute of 1. *H.* 4 took away any treasons but those of 21. & 22. year of *R.* 2. this clears it both for treasons made by Parliament, or declared in Parliament, even to the time of making the Statute.

This is of great use, of great security to the subject; so that as to what shall be treason, and what not, the Statute of 25. *E.* 3. remaines entire, and so by consequence the treasons at the common Law.

Onely, my Lords, it may be doubted whether the manner of the parliamentary proceedings be not altered by the Statute of 1. *H.* 4. the 17. chapter, and more fully in the Parliament roll, number 144. that is, whether since that Statute the parliamentary power of declaration of treasons, whereby

the

the inferiour Courts received jurisdiction, be not taken away and restrained onely to Bill, that so it might operate no further than to that particular contained in the Bill; that so the parliamentary declarations for after times, should be kept within the Parliament it selfe, and be extended no further. Since 1. *H.* 4. we have not found any such declarations made, but all Attainders of treason have been by Bill.

If this be so, yet the common Law treasons still remaining, there is one and the same ground of reason and equity since 1. *H.* 4. for passing of a Bill of treason, as was before for declaring of it without Bill.

Herein the *Legislative* power is not used against my Lord of Strafford in the Bill, its onely the jurisdiction of the Parliament.

But, my Lords, because that either through my mistaking of the true grounds and reasons of the Commons, or my not pressing of them with apt arguments and presidents of former times, or that perchance your Lordships from some other reasons and authorities, more swaying with your Lordships judgements, than these from them, may possibly bee of a contrary or dubious opinion concerning these treasons, either upon the Statutes of 25. *E.* 3. & 18. *H.* 6. or at the common Law.

My Lords, if all these five should faile, they have therefore given me further in command to declare to your Lordships some of their reasons, why they conceive

conceive that in this case the meer *Legislative* power may be exercised.

Their reasons are taken from these three grounds:

1 From the nature and quality of the offence.

2 From the frame and constitution of the Parliament wherein this Law is made.

3 From practises and usages of former times.

My Lords, The horridnesse of the offence in endevouring the overthrowing the Lawes and present government, hath been fully opened to your Lordships heretofore.

The Parliament is the representation of the whole Kingdome, wherein the King as Head, your Lordships as the more noble, and the Commons the other members, are knit together into one Body politick: This dissolves the arteries and ligaments that hold the Body together, the Lawes: He that takes away the Lawes, takes not away the allegeance of one subject alone, but of the whole Kingdome.

It was made treason by the Statute of 13. *El.* for her time, to affirme, That the Lawes of the Realme doe not binde the descent of the Crown; no Law, no descent at all.

No Lawes, no Peerage, no ranks or degrees of men; the same condition to all.

It's treason to kill a Judge upon the Bench; this kils not *Iudicem*, *sed Iudicium*: He that borrowed *Apelles*, and gave bond to rerurn againe *Apelles* the Painter, sent him home after he had cut off his right hand; his bond was broken, *Apelles* was sent, but not the Painter. There bee twelve men, but no

Law;

law there's never a Judge amongst them.

It's felony to imbezill any one of the judiciall Records of the Kingdome, this at once sweeps them all away, and from all.

Its treason to counterfeit a twenty shill. piece, here's a counterfeiting of the Law, we can call neither the counterfeit nor true coine our owne.

Its treason to counterfeit the great Seale for an acre of land, no property hereby is left to any land at all. Nothing treason now, either against King or Kingdome, no law to punish it.

My Lords, if the question were asked in Westminster Hall, whether this were a crime punishable in Starre-chamber, or in the Kings Bench, by fine or imprisonment, they would say, It went higher: If whether felony, they would say, That's for an offence onely against the life or goods of some one or few persons: It would, I beleeve, be answered by the Judges, as it was by the chiefe Justice *Thirning*, in a 1. *R.* 2. That though he could not judge the case treason there before him, yet if he were a Peere in Parliament, hee would so adjudge it.

My Lords, if it bee too bigge for those Courts, we hope its in the right way here.

2. The second consideration is from the frame and constitution of the Parliament, the Parliament is the great body politicke, it comprehends all from the King to the Beggar: if so, my Lords, as the naturall, so this body, it hath power over it selfe, and every one of the members for the pre-

servation of the whole. Its both the Physicitn and the patient: if the body bee distempered, it hath power to open a veine to let out the corrupt blood for curing of it selfe; if one member be poysoned or gangrened, it hath power to cut it off for the preservation of the rest.

But, my Lords, it hath bin often inculcated, that Law-makers should imitate the supreme Law-giver, who commonly warnes before he strikes; the Law was promulged before the judgement of death for gathering the sticks, no law, no transgression.

My Lords, to this the rule of law is, *Frustra legis auxilium invocat, qui in legem commisit*, from the *lex Talionis*, he that would not have had others to have law, why should he have any himselfe? why should not that bee done to him, that himselfe would have done to others?

It's true, we give law to Hates and Deeres, because they be beasts of Chase; It was never accounted either cruelty or foul play to knock Foxes and Wolves on the head, as they can be found; because these be beasts of prey: The Warrener sets traps for Powlcats and other Vermine, for preservation of the Warren.

Further, my Lords, most dangerous diseases, if not taken in time, they kill: Errors in great things, as Warre and Marriage, they allow no time for repentance, it would have been too late to make a law, when there had been no law.

My Lords, for further answer to this objection,

Vide Lady of the Lake

What a rare? But what are case of how it when
[illegible] is [illegible] The [illegible] for was [illegible]

ang he hath offended a law, a law within. Therendeavoring to subvert the laws and policies of the state wherein he lived, which had so long and with such tacitulnesse protected his Ancestors, himself, and his whole family, it was not *malum quia prohibitum*, it was *malum in se*, against the dictates of the dullest conscience, against the light of nature, they, not having the law, were a law unto themselves.

Besides this, he knew a law without. That the Parliament in cases of this nature had *perpetuam vim & vim.*

Nay, he well knew, that he offended the proper and ordinary rules of law. Crimes against law have been proved, have been confessed, so that the question is not *de culpa, sed de pœna*, what degree of punishment those faults deserve; we must differ from him in opinion, that twenty felonies cannot make a treason, if in the nature of a quality in the use of the Legislative power; for, he that deserves death for one of these felonies alone, deserves a death more painfull and more ignominious for all together.

Every felony is punished with loss of life, lands, and goods; a felony may bee aggravated with those circumstances, as that the Parliament with good reason may adde to the circumstances of punishment, as was done in the case of Richard in the Parliament of 2 Henry 4. who for a barbarous murder committed upon the Duke of Glocester, stifling him between two feather-beds at Calice, was adjudged to be hanged, drawn, quartered,

Batteries by Law are punishable only by fine and single dammages to the party wounded.

In the Parliament held 1 [illegible] 3. and 4. Mary, a constituted a Battery upon one [illegible] servant to Sir *John Brooke*, a knight of the Parliament for Somersetshire, Its there enacted, that he shall pay double dammages, and shall be convicted if he render not himselfe by such a time. The manner of proceedings quickned, the penalty doubled, the circumstances were considered, it concerned the Commonwealth, it was Battery with breach of priviledge of Parliament.

This made a perpetuall Act, not belonging to the first offender, And in the Kings Bench, as appears by the booke case 19. *H.* 4. the first leaf, double dammages were recovered.

My Lords, in this of the Bill the offence is high and generall, against the King and the Commonwealth, against all and the best of all.

If every Felony be losse of life, lands and goods, what is mister of the Legislative power, by addition of Ignominie in the death and disposall of the lands to the Crown, the publike patrimony of the kingdome.

But it was hoped that your Lordships had no more skill in the Art of killing of men, then your worthy Ancestors.

My Lords, this appeale from your Ancestors, was done of [illegible] of that from your Lordships [illegible]

He hath appealed [illegible]

be pleased to hearke what judgement [illegible] already given in the Case, this is the [illegible] ders of treason in Parliament, [illegible] 25. E. 3. for treasons not [illegible] Statute, and those upon the first offendors without warning given them.

By the Statute of 25. E. 3. [illegible] to levy war against the King [illegible] wards in Parliament in 1. R. 2. [illegible] judged traytours for surrendring two severall Castles in *France* onely out of feare, without any compliance with the Enemy, shall it not [illegible] the Statute of 25. E. 3.

My Lords, in 3. R. 2. *John Kirby* that came into England upon letters of safe conduct, as an Agent for the state of Genoah, being in the Evening before his doore in Bredstreet, as the words of the Records are, *Paulus* [illegible] *John Kirby* and another Citizen coming that way, casually *Kirby* trode upon his [illegible] twilight this grew to a quarrell, and the [illegible] doore was slaine; *Kirby* was [illegible] for, the indictement includes all this, and [illegible] onely done *se defendendo*, and without malice [illegible]

The Iudges, it being out of the Statute of 25. E. 3. could not proceed, the Parliament declared it treason, and judgement [illegible] there's nothing can bring this within the Statute of 25. E. 3. but I conceive the honour of the Nation, [illegible] the publique safety would be strictly [illegible] might endanger the [illegible] of the King [illegible]

they

confed.

A judgment for expediency — not on the practice of the court —

they made not a Law first, they made the first man an example. This is in the Parliament roll, 3. R. 2. [illegible] Terms, R. 2. [illegible] in the [illegible] judgment is given against him, [illegible] and some others attainted of treason for delivering opinions in the subversion of the Law, and some others for plotting the like: My Lords, these are such upon another occasion begun to your Lordships, only this is observable. These in the Parliament of the first yeare of *Henry* the third, where all treasons are against reduced to the Statute 25. E. 3. these Attainders were by a particular Act confirmed and made good, that the memory thereof might be transmitted to succeeding ages: They stand good unto this day, the Offences crime, as here, were endeavouring the subversion of the Law.

[illegible] Sir *John Hengham* being commanded to the Tower upon suspition of treason, or the prison, he made an escape: this is no way within any Statute, or any former judgment at common Law, but for this, that is, for breaking the prison only, and yet the same in the Parliament held the second yeare of *Henry* the sixth, he was attainted of high treason by Bill.

[illegible] only rounds, yet one [illegible] not of poor [illegible] of Rochester where [illegible] died, [illegible] attainted of treason and [illegible] to death by the [illegible]

By

By the Statute of 25. *H.* 8. *Elizabeth Barton*, the holy maid of Kent, for pretending revelations from God, that God was displeased with the King for being divorced from the Lady *Katherine*, and that in case he persisted in the separation, and should marry another, that he would not dure the King above one moneth after; because this tended to the depriving his (the lawfull) succession to the Crowne there was attainted of treason.

In the Parliament 2. *Ric.* 3. *H.* 6. *cap.* 16. the Lord Admirall of England was attainted of treason for procuring the Kings dissent to the Act of Parliament, to be good to the said Earle in such matters as he should declare unto them, for saying that he would make the Parliament the blackest Parliament that ever was in England, endevouring to marry the Lady *Elizabeth* the Kings sister, taking a bribe of *Sherrington*, accused of treason, & thereupon consulting with Councell for him, and some other crimes, none of them treason, so cleerly within the Statute of 25. *E.* 3. or any other Statute, as is the case in question.

My Lords, All these Attainders, for ought I know, are in force at this day; the Statutes of the first yeere of *Henry* the fourth, and the first of Qu. *Mary*, although they were willing to make the Statute of the five and twentieth yeare of *Edward* the third the rule to the inferiour Courts, yet they left the Attainders in Parliament precedent to themselves untouch't, wherin the *Legislative* power had been exercised. Ther's nothing in them whence it

can

[illegible] but that they intended to leave it [illegible] for the [illegible] Attainders, where were crimes and offences against the Law, they thought [illegible] circumstances considered, to heighten and add to the degrees of punishment, and that upon the first offenders [illegible] above one month after [illegible]

My Lords, We desire as just, the other Lawes and Statutes made by these our Ancestors: they are the rules we goe by in other cases, why should we differ from them in this alone?

These, My Lords, are in part those things which have stirred the Commons in passing of the Bill; It is now left to the Judgement and Justice of your Lordships, [illegible]

FINIS

89953